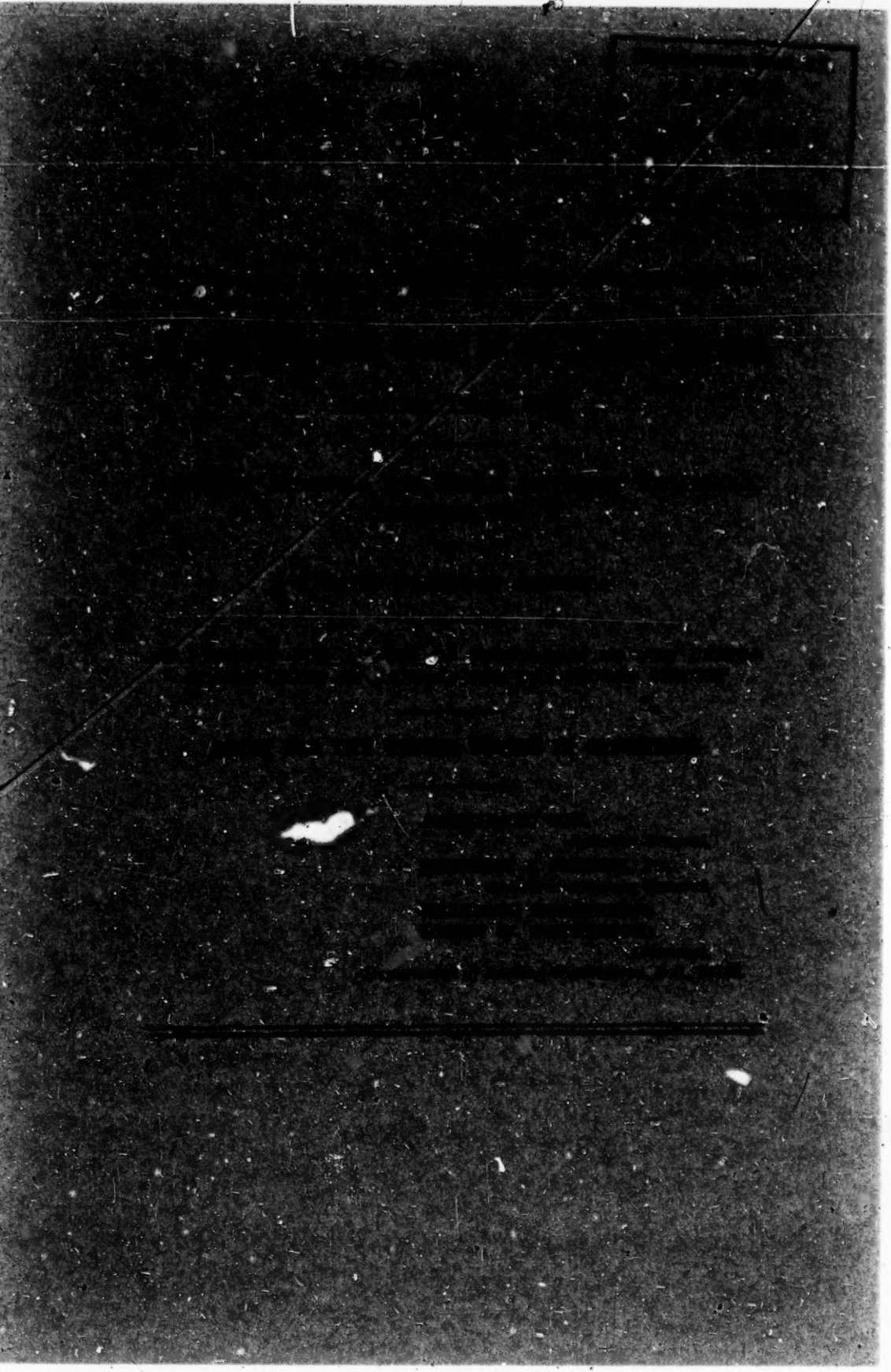

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733-671—61—1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1084

ANTHONY MUGNOLA AND PETER ANTHONY YUASTELLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A-1 to A-9) is reported at 328 F. 2d 460.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1964. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certiorari was extended to and including May 8, 1964. The petition for a writ of certiorari was filed on May 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court should have ordered a hearing *sua sponte* to determine whether a member of the jury was prejudiced against petitioners because, as she disclosed in a note to the judge, anonymous telephone calls had been made to her home during the trial.

2. Whether petitioners were properly joined in a conspiracy count with three co-defendants.

3. Whether petitioners could be convicted for possession of counterfeit currency even though the currency was not itself introduced into evidence.

4. Whether it was proper, with respect to the testimony of an accomplice, to instruct the jury that the principal government witness was a "confessed accomplice" whose testimony should be carefully scrutinized.

STATUTE INVOLVED

18 U.S.C. 472 provides as follows:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent to brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

Petitioners and two co-defendants were convicted after a trial by jury in the United States District Court for the Eastern District of New York of possession of counterfeit currency and of conspiracy to

possess and utter such currency in violation of 18 U.S.C. 472 and 371 (1 R. 13–16).[1] They were sentenced to concurrent terms of imprisonment of eight years on the substantive count and five years on the conspiracy count (1 R. 351–354). The court of appeals affirmed.

1. The evidence, which consisted principally of the testimony of De Santis, a severed co-defendant who pleaded guilty to the conspiracy charge, and Pokras, who had been acting as an undercover agent for the Secret Service, may be briefly summarized:

De Santis testified that in November 1960 he showed co-defendant Gersh a counterfeit twenty-dollar bill and asked him if he knew anybody who could use such bills. The cost, he said, would be 16% of the face value of the counterfeit if more than $100,000 was purchased (1 R. 28–31; 2 R. 4–10). A few days later, Gersh called and said that he had found someone (1 R. 31; 2 R. 11–13). A meeting was arranged, to be held at a boatyard belonging to Pokras, who had been asked by De Santis to help deliver the counterfeit (1 R. 33–36). At this meeting, Gersh introduced co-defendant Kane, who was to share in Gersh's proceeds, and both petitioners, who were the prospective purchasers. Petitioners said that they had the money and wanted to complete the deal immediately, but De Santis said this was impossible (2 R. 14–29).

[1] Prior to trial, over defense objections, the court severed various other defendants and counts of the indictment (2 R. 199–225). At the conclusion of the trial, the court directed a judgment of acquittal as to one co-defendant (1 R. 8).

It was arranged that De Santis and Pokras would meet petitioners on the following morning (1 R. 35–36; 2 R. 33–34).

In preparation for this meeting, Pokras was instructed to make a reservation at a Lynbrook motel (2 R. 36). Thereafter, De Santis met co-defendant Mentesana at a bar. They waited approximately half an hour until the counterfeit was delivered to Mentesana, who thereupon gave it to De Santis. De Santis agreed to return after completing the transaction with petitioners and to pay Mentesana $13,000. De Santis then picked up Pokras, who packed the money in an attaché case (2 R. 39–41). The two of them drove to the Lynbrook motel, but De Santis became suspicious of the occupants of a car parked nearby, and they proceeded to another motel where they counted and examined the money. Some of the bills were lighter in shade than others. The ink rubbed off on their hands and had a peculiar odor. The face plate numbers were identical on all the bills. The serial numbers were the same on all bills, except that on some of them a single digit had been changed (1 R. 38; 2 R. 42–43).

De Santis and Pokras put the counterfeit in a bureau drawer and returned to the boatyard to meet petitioners. The four then returned to the motel, where petitioner Yuastella, accompanied by Pokras, entered the room to examine the counterfeit currency. After Yuastella approved it, he urged the others to come inside to complete the deal. Once De Santis and Pokras were in the room, petitioners

forced them into the bathroom at gunpoint and then absconded with the currency (1 R. 39; 2 R. 43–48). Later efforts by De Santis and Pokras to locate petitioners were unavailing (1 R. 98–102; 2 R. 49–66).

Pokras confirmed the foregoing account in detail (1 R. 113–114; 2 R. 97–132). He also testified that in November 1960 he had been working as an undercover agent for the Secret Service (2 R. 97). The chief of independent services of the Bureau of Engraving, in answer to a hypothetical question describing the currency, expressed the opinion that it was counterfeit (2 R. 117).

2. The jury began its deliberations about noon and returned its verdict at 10:45 p.m. on October 22, 1962. On the government's request that the defendants be remanded to custody, the court made this statement (1 R. 337):

> Well, I will tell you what bothers me here, Mr. Lewis, and I want all the defendants to hear that because I don't know just who is responsible, and that is this:
>
> Someone had made some phone calls, anonymous phone calls, to the witness Pokras; and someone has made some anonymous phone calls to the forelady of this jury—she reported them to me this morning—all yesterday without waiting for anyone to pick up the receiver and simply stopping as soon as the receiver was picked up, but then renewing the call every hour, beginning also this morning at 6:30.
>
> She had never received such calls before until she served on this jury, and of course there have been some phone calls to Pokras.

No request for a hearing or any other relief based upon the information concerning the telephone calls was made by defense counsel until five weeks later, at the sentencing, when petitioner Yuastella's counsel moved to set aside the verdict or for a new trial on this ground (1 R. 339). The court then clarified the circumstances of the communication from the forelady as follows (1 R. 343)[*]:

> Here is the way it happened: She sent in a note to the effect that her husband was ill and she wanted someone to call up her husband to see how he was; and whether or not the phone calls that had been the preceding day or that night—I forget which—were continuing; and I had the bailiff or my law clerk—I don't know which—make the call to her husband. The report was that not [*sic*] phone calls had been continued or continued and a note was sent in that her husband was all right. The phone calls had not continued.

The motion for a new trial was then denied (1 R. 343–344). The court also stated that the forelady had been instructed not to mention the matter to the other jurors (1 R. 345–346). The note of the forelady was not found, but the memorandum which had been prepared in the court's chambers and sent to the forelady was found and marked as a court exhibit (1 R. 346–347). Counsel for petitioner Mugnola expressed his approval of the manner in which the court had handled the situation (1 R. 346).

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[*] His statement was as follows (1 R. 346):

"Believe me, Judge Bartels, I have no complaint with the action of the Court as to what occurred relative to those tele-

ARGUMENT

1. Since the telephone caller never spoke to the juror or to any member of her family, and since there is no indication whatever in the record that the calls were related to the case on trial or that the juror assumed them to be so related, the cases relied on by petitioner—which involved communications between jurors and third persons with respect to a case on trial (Pet. 12–16)—are inapposite. From all that appears in the record, the juror's principal concern was the health of her husband, and she was disturbed lest the calls of unknown origin were to affect his condition. Petitioner presented no evidence—by affidavit of the juror or otherwise—prior to his motion for a new trial to justify the calling of the juror for an examination into the effect which the anonymous calls may have had on her. Nor is it clear, despite petitioner's suggestion to the contrary (Pet. 14), that the juror communicated with the court before the deliberations began. Indeed, the fact that the exchange between them took the form of written notes indicates that the juror first notified the court of the calls after deliberations began. Under these circumstances, as the court of appeals observed, it was petitioner's burden to come forward with evidence "that would raise an issue of prejudice by showing that the forelady attributed the annoying calls to" the defendants (Pet. A-9).

2. The record amply supported petitioner's conviction of conspiracy to possess counterfeit currency with

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phone calls. The judgment that the Court exercised in my opinion was the judgment that I would have exercised myself had I been in your position."

intent to defraud. Petitioners assert that the sellers of the currency had possession before petitioners participated in the plan. The record shows, however, that the other named conspirators did not obtain the currency until they had found a purchaser. De Santis was to get the currency from Mentesana, who himself had to wait with De Santis for half an hour on the following morning before he was given the currency. Even if petitioners secretly intended not to perform their part of the bargain, the agreement to possess counterfeit money jointly nonetheless existed. The fact that the contraband was to pass through various hands before reaching petitioners did not make each set of transferors a separate group of conspirators. Cf. *United States* v. *Agueci*, 310 F. 2d 817, 828 (C.A. 2), certiorari denied, 372 U.S. 959; *United States* v. *Aviles*, 274 F. 2d 179, 189 (C.A. 2), certiorari denied *sub nom. Evola* v. *United States*, 362 U.S. 974.[3]

3. Contraband need not be introduced into evidence in order to support a conviction for its possession. *United States* v. *Agueci*, *supra*, 310 F. 2d at 828; *Lisansky* v. *United States*, 31 F. 2d 846, 850 (C.A. 4),

[3] Petitioners' present claim is particularly inappropriate in light of their vehement objections before trial to the severance of any co-defendants. Counsel for petitioner Yuastella said (2 R. 213): "And I say if your Honor takes out of this particular case the key figure, the terrific damage and prejudice that might result in this case because of such severance will deprive my client and, I dare say some of the other defendants also of a fair day in court." Counsel for petitioner Magnola said (2 R. 201): "I say that * * * if there is a severance we may be deprived of the benefit of evidence that could be adduced if these defendants were in fact on trial." All of the defendants objected to the severance (2 R. 199–225).

certiorari denied, 279 U.S. 873. Otherwise, offenders could avoid prosecution by concealing or destroying counterfeit or otherwise prohibited matter. *United States* v. *Howell*, 64 Fed. 110, 113. Here there was ample evidence that petitioners knew that the notes were counterfeit, that they had the necessary intent to defraud, and that the notes, which resembled genuine twenty-dollar bills, were in fact counterfeit. The suggestion that examination of the counterfeit currency would have demonstrated it to be so patently unauthentic as to make its passing impossible (Pet. 27) is totally without substance. The statute forbids falsification of government obligations whether the copies are good or bad. *Webb* v. *United States*, 216 F. 2d 151, 152 (C.A. 6).

4. The court instructed the jury (1 R. 303):

> The Government called as a witness the defendant Ralph De Santis, *who was a confessed accomplice.*
>
> * * * * * *
>
> The testimony of an accomplice, however, should be taken with great caution and should be scrutinized very carefully by you. You should consider the circumstances under which he has testified, his deep personal interest in the ultimate verdict, his hope for leniency, his demeanor on the stand and such other factors that may have influenced his testimony. * * * [Emphasis added.]

This instruction did not, as petitioners claim, tell the jury that petitioners were guilty. De Santis admitted that he had joined persons engaged in an

illegal enterprise, including named conspirators other than petitioners. The jury was, therefore, free to find that petitioners were not members of this illegal venture. Moreover, the particular phrase to which petitioners object was merely a summary of De Santis' testimony and could be accepted or rejected by the jury as could any other matter to which he testified.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1964.

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